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# **Organised Crime And The Criminal Justice And Licensing (Scotland) Act 2010**

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A. INTRODUCTION

B. DEFINING (SERIOUS) ORGANISED CRIME

C. INVOLVEMENT IN SERIOUS ORGANISED CRIME

D. DIRECTING SERIOUS ORGANISED CRIME

E. EVIDENCE MATTERS

F. FAILURE TO REPORT SERIOUS ORGANISED CRIME

G. OFFENCES AGGRAVATED BY CONNECTION WITH SERIOUS ORGANISED CRIME

H. CONCLUSION

## **A. INTRODUCTION**

Organised crime in Scotland has been characterised, in rather lurid terms, as a blight<sup>1</sup> and a cancer.<sup>2</sup> Regardless of whether such rhetoric is justified, describing and defining what organised crime actually is, in an effort to criminalise and punish it, poses significant theoretical and legal problems. Nonetheless, the Scottish Parliament addressed this issue in the Criminal Justice and Licensing (Scotland) Act 2010, in the first such legislative effort in the United Kingdom.

The 2010 Act defines the foundational concept of “serious organised crime”, and includes a number of separate provisions predicated on it, concerning involvement, direction, and failure to report, as well as sentence aggravation. This paper presents a critical appraisal of the definition of “serious organised crime” in the first instance, and then of each of these

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<sup>1</sup> Serious Organised Crime Debate, Scottish Parliament, 11 March 2010, Col 24544 per Justice Secretary Kenny MacAskill.

<sup>2</sup> Scottish Government, *Serious Organised Crime Taskforce* (Press release, 22 October 2007).

provisions. The analysis is both doctrinal and normative, and raises a number of concerns, centring on scope, necessity and effectiveness. Overall, the provisions are expansive and capture some unproblematic actions; they often duplicate existing law; and their value in addressing this particular type of crime has yet to be established.

## **B. DEFINING (SERIOUS) ORGANISED CRIME**

The precise numbers of organised crime groups identified in 2009 by the Scottish Serious Organised Crime Group Mapping Project (367, to be exact)<sup>3</sup> belies the contested definition and nature of organised crime. Many variants co-exist in the academic, legal and political spheres;<sup>4</sup> the term may imply specific structures, organisations or networks that are involved in criminality, the (illegal) provision of (prohibited) goods or services, or certain types of crime that meet a given level of gravity.<sup>5</sup>

The widespread popular view of organised crime, exemplified in numerous films and TV shows, mirrors Cressey's work on the Mafia in mid-twentieth century North America,<sup>6</sup> in which he identified strict command structures, fixed hierarchies, and collective norms and identity in such organisations.<sup>7</sup> However, this understanding is not substantiated by contemporary empirical studies, which depict much looser arrangements.<sup>8</sup> So, there has been a shift in the theoretical focus toward the illegality of the activities, and to a more nuanced understanding of the nature and structure of the group or network responsible.<sup>9</sup> For example, Maltz sees organised crime as

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<sup>3</sup> Scottish Government, *Letting Our Communities Flourish: A Strategy for Tackling Serious Organised Crime in Scotland* (2009) para 34. See also Scottish Serious Organised Crime Group Mapping Project, *Preliminary Findings On The Scale And Extent Of Serious Organised Crime In Scotland* (2009) 3.

<sup>4</sup> P Van Duyne, "The phantom and threat of organized crime" (1996) 24 *Crime, Law And Social Change* 341 at 343. Also see F Varese, "What is organized crime?" in F Varese (ed) *Organized Crime: Critical Concepts in Criminology* (2010) 1-33; F E Hagan, "The organized crime continuum: A further specification of a new conceptual model" (1983) 8 *Crim Justice Rev* 52; and Frank E Hagan, "'Organized Crime' and 'organized crime': Indeterminate problems of definition" (2006) 9 *Trends in Organized Crime* 127.

<sup>5</sup> See L Paoli and C Fijnaut, "Organised crime and its control policies" (2006) 14 *Eur J of Crime, Crim Law and Crim Justice* 307 at 308; N Hamilton-Smith and S Mackenzie, "The geometry of shadows: a critical review of organised crime risk assessments" (2010) 20 *Policing and Society* 257 at 261.

<sup>6</sup> D Cressey, *Theft of the Nation: The Structure and Operations of Organized Crime in America* (1969) 72. Also see H Abadinsky, *Organized Crime*, 9th edn (2010) 3.

<sup>7</sup> See L Paoli, *Mafia Brotherhoods: Organized Crime, Italian Style* (2003) at 4, 21 and 220.

<sup>8</sup> Paoli, *Mafia Brotherhoods* (n 7) 224; D Hobbs, "Going Down the Glocal: The Local Context of Organised Crime" (1998) 37 *The Howard J of Crim Justice* 407 at 415.

<sup>9</sup> A Block and W Chambliss, *Organising Crime* (1981) 13; J Albin *The American Mafia: Genesis of a Legend* (1971); A K Cohen, "The concept of criminal organisation" (1977) 17 *Brit J of Criminol* 97 at 98.

including four characteristics: violence, corruption, continuity, and variety in the types of criminality engaged in.<sup>10</sup> Hagan points to the provision of “illicit goods that are in public demand”,<sup>11</sup> while Levi lays emphasis on the central aim of making a profit.<sup>12</sup> A rather different focus is provided by Finckenauer, who argues that organised crime can only be committed by a criminal organisation, which is an advanced, durable and constant network whose members go beyond single instances of criminality and who view themselves as a criminal organisation.<sup>13</sup>

Conceptually and empirically, organised crime may be difficult to distinguish from other types of serious criminality such as terrorism and “white collar” crime. In the first instance, the absence of ideology is key.<sup>14</sup> While there may be a nexus in terms of the personnel involved,<sup>15</sup> for organised crime the only true motivation is profit through the creation, control or maintenance of (illicit) markets, in contrast to terrorism which aims to coerce a government or organisation to act in a particular manner through violence targeting civilians.<sup>16</sup> Moreover, though it has been argued that organised crime and white collar crime are interwoven and may be indistinguishable,<sup>17</sup> the latter is described as an “abuse of a legitimate occupational role which is regulated by law”.<sup>18</sup> Thus the status or position of the actor involved is critical. In addition, white collar crime is not underpinned by the use or threat of violence.<sup>19</sup>

Attempts to translate the imprecise concept of organised crime into law are fraught with difficulty. In the UK, Scotland alone has introduced legislation providing for substantive organised crime offences, despite the Home Office recommendation in 2004 of the criminalisation of organised crime as an enterprise in itself.<sup>20</sup> The Criminal Justice and Licensing

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<sup>10</sup> M Maltz, “On defining “organized crime”: The development of a definition and a typology” (1976) 22 *Crime and Delinquency* 338.

<sup>11</sup> F E Hagan, *Crime Types and Criminals* (2010) 300.

<sup>12</sup> M Levi, “The Organization of Serious Crimes for Gain” in M Maguire, R Morgan and R Reiner (eds) *The Oxford Handbook of Criminology* 5th edn (2012) 595.

<sup>13</sup> J O Finckenauer, “Problems of definition: What is organized crime?” (2005) 8 *Trends in Organized Crime* 63 at 75 -76.

<sup>14</sup> *Ibid* 65.

<sup>15</sup> See T Makarenko “The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism” (2004) 6 *Global Crime* 129-145; L Shelley, J Picarelli, et al *Methods and Motives: Exploring Links between Transnational Organized Crime & International Terrorism* (2005).

<sup>16</sup> A Cassese, *International Criminal Law*, 2<sup>nd</sup> edn (2008) 167.

<sup>17</sup> V Ruggiero, *Organized and corporate crime in Europe: Offers that can't be refused* (1996); J Lea, *Crime and Modernity* (2002) 144-146.

<sup>18</sup> H Croall, *Understanding White Collar Crime* (2001) 6.

<sup>19</sup> See A Wright, *Organised Crime* (2005) 63.

<sup>20</sup> Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* (Cm 6167: 2004) 43. In England and Wales prosecutors rely on the statutory offences of conspiracy and of encouraging and assisting crime

(Scotland) Act 2010 defines “serious organised crime” and creates a number of substantive offences based on this.<sup>21</sup> This can be described as focusing on the “what” rather than the “who” of organised crime,<sup>22</sup> and contrasts with the approach of the United Nations and the European Union, which centres on the group or organisation involved<sup>23</sup> and which has been adopted in the Republic of Ireland, for example.<sup>24</sup> The focus in Scotland on the crime rather than on the organisation is notable, given that organised crime usually is seen as distinctive because of the nature of its structure, and because of features like the entity’s endurance, cooperation and resort to violence.

In Scotland, “serious organised crime” is defined as crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offence or a series of such.<sup>25</sup> Here a “serious offence” means an indictable offence committed with the intention of obtaining a material benefit, or an act or threat of violence made with the intention of obtaining such benefit in future.<sup>26</sup> Thus, the definition is framed very broadly and may involve just two people, in contrast to the sociological and criminological understanding of organised crime as a group activity.

It is questionable whether just two individuals in fact can commit organised crime, given its commonly understood structure and form. In the first instance, the constituent notions of durability and continuity that are highlighted in scholarship on organised crime<sup>27</sup> are unlikely to be evident when considering the actions of just two people. One of the distinguishing and most concerning dimensions of organised crime is that it can persist despite changes in personnel or withdrawal of individual involvement. The absence of one person will not usually frustrate the plans, indicating the robustness of such organisations. This is not reflected in the Scottish definition.

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(Part 2 of the Serious Crime Act 2007), rather than on legislation against organised crime specifically. See text accompanying n 55 below.

<sup>21</sup> For an examination of “lower levels” of organised crime see P Stelfox, “Policing lower levels of organised crime in England and Wales” (1998) 37 *The Howard J of Crim Justice* 393 at 394.

<sup>22</sup> M Woodiwiss, “Organized crime – The dumbing of discourse” (2000) 3 *British Criminology Conference: Selected Proceedings*, Liverpool, July 1999, 3-4.

<sup>23</sup> United Nations Convention Against Transnational Organized Crime (GA Res 25, annex I, UN GAOR, 55th Sess, Supp No 49 at 44, UN Doc A/45/49 (Vol I) (2001) Art 2; Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime.

<sup>24</sup> Criminal Justice (Amendment) Act 2009.

<sup>25</sup> *Ibid*, s 28.

<sup>26</sup> *Ibid*, s 28(3).

<sup>27</sup> See Maltz (n 10) and Finckenauer (n 13).

One aspect of the wrong in organised crime lies in the sustaining of on-going criminal activity, in addition to the wrong inherent in the individual acts committed. So, in general, actions perpetrated by criminal organisations are more problematic than those by individuals or pairs, on the basis of a number of factors. Groups can corner significant power in illegal markets and thereby generate considerable profits; this may assist future criminality and bolster the longevity of the group. In addition, the likelihood of detection is diminished because of the dispersal and subdivision of tasks, and detection of some individuals need not compromise the group as a whole. There is an increased chance of violence, be that against witnesses or other group members, to ensure the group's success and survival.<sup>28</sup> Moreover, there is a greater likelihood of corruption of officials and of displacement of legal means of dispute resolution. Collaborating to act together means that the offence is more likely to be completed through the commitment to the group,<sup>29</sup> and by virtue of the availability of other members of the group. In essence, I suggest that organised crime cannot be perpetrated by a lone individual or by a pair of actors; coordination with others is key. These factors underline the need to view organised crime as a collective enterprise.

All of this implies that the definition in the 2010 Act is misguided due to its inconsistency with the core wrongs of serious organised criminality, which relate to the entity rather than the behaviour alone. Nonetheless, it may be argued that different definitions are appropriate for different purposes; in other words, any legislative definition need not map precisely onto the theoretical understanding of organised crime. It is not incoherent to regard organised crime *in toto* as a group phenomenon but then to conclude that combating organised crime requires the creation of offences that can be committed by fewer people than this. In fact, this is precisely what relevant international instruments do. While the EU Framework Decision defines a "criminal organisation" as involving more than two people,<sup>30</sup> it then requires Member States to have an offence of agreeing "with one or more persons" that certain crimes be committed.<sup>31</sup> Though it would be preferable for the Scottish definition to refer to three people or more so as to map onto the meaning of organised crime more

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<sup>28</sup> P A Curry and S Mongrain "What is a criminal organization and why does the law care?" (2009) 10 Global Crime 6 at 10-17.

<sup>29</sup> The Law Commission, *Conspiracy and Attempts: A Consultation Paper* (2007) para 2.34.

<sup>30</sup> See above (n23), art 1.

<sup>31</sup> *Ibid*, art 2. See, similarly, art 5(1)(a) of the UN Convention: "agreeing with one or more other persons". Article 2 of the Framework Decision is entitled "Offences relating to participation in a criminal organization", though this is a misnomer as a connection to such an organisation need not be proven.

accurately, in operational and practical terms it is understandable why a broader approach has been adopted.

As noted above, the 2010 Act takes a “serious offence” to mean an indictable offence committed with the intention of obtaining a material benefit, or an act or threat of violence made with the intention of obtaining such benefit in future.<sup>32</sup> Again, this may be contrasted with the EU definition, which requires the offence only to be punishable by at least four years’ imprisonment.<sup>33</sup> Of course, this focus on the length of sentence is at best a contingent choice, and may even be viewed as arbitrary, as a legislative amendment relating to sentencing would alter the inclusion of certain offences and thus the definition of organised crime. So, the Scottish definition is to be preferred for its focus on the nature and elements of the criminality. In addition, this definition is more limited insofar as it requires the intention of generating a benefit, which approaches Levi’s conception of organised crime as involving profit.<sup>34</sup> There is no reference in the 2010 Act to any specific substantive offences akin to the list of “criminal lifestyle” offences articulated in Schedule 2 to the Proceeds of Crime Act 2002, namely “criminal conduct associated with professional criminals, organised crime and racketeering”.<sup>35</sup> Such offences fit readily with the conventional perception of organised crime but would narrow the scope of the 2010 Act, and so the lack of specificity is understandable.

Overall, “serious organised crime” in Scotland requires the intention of obtaining a material benefit, but not necessarily the use of violence, thereby encompassing what often is conceived of as white collar crime. It remains to be seen whether this Act is used in relation to such corporate criminality, or whether the focus is on those involved in illegal markets and violent criminality. Moreover, the legislation does not require continuity of the composition of the perpetrators or the organisation as mentioned by the UN,<sup>36</sup> thereby ensuring that loose arrangements of people may fall within its scope. This is a practical recognition of the fact that much of what is regarded as organised crime in Scotland and the UK more widely is in fact

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<sup>32</sup> See above (n 26).

<sup>33</sup> Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime Article 1; Criminal Justice (Amendment) Act 2009 s 3.

<sup>34</sup> See Levi, “The Organization of Serious Crimes for Gain” (n 12).

<sup>35</sup> This includes drug trafficking, counterfeiting, arms trafficking, trafficking for the purposes of sexual exploitation and money laundering.

<sup>36</sup> UN Convention Against Transnational Organized Crime article 2; also see Finckenauer (n 13).

“disorganized”<sup>37</sup>, or comprises groups assembled on a short-term basis for specific projects from a pool of professional criminals in a certain area.<sup>38</sup>

The definition in the 2010 Act echoes to a large extent the proposal in a 2009 Scottish Government strategy document, although there serious organised crime was deemed to involve “control, planning and use of specialist resources”.<sup>39</sup> There are no such conditions in the 2010 Act. While inclusion would mean that the legislative definition approaches more precisely the accepted theoretical understanding of organised crime, this would, of course, make the behaviour more difficult to prosecute. Furthermore, when the Criminal Justice and Licensing (Scotland) Bill was debated, a Stage 2 amendment was tabled, seeking to require that the “crime” in the definition be “reasonably ... regarded as being both serious and organised”.<sup>40</sup> Despite the logic of this suggestion, it was rejected on the basis that apparently minor or trivial activities “often form part of a more insidious picture”.<sup>41</sup> While this attempt to capture what appears to be less serious behaviour is understandable as regards crime control, ultimately it means that criminality of an entirely different extent and nature may fall within the definition. Moreover, it dilutes the notion of organised crime to such an extent as to render it meaningless analytically and indistinguishable from other forms of joint criminality. This is exemplified by the fact that the definition of serious organised crime encompasses two people working together to commit a robbery. Admittedly, this is not a minor offence: nonetheless it is difficult to view this as organised crime as commonly understood and as warranting equivalent opprobrium, notwithstanding the conceptual latitude of the term as outlined above.

Building on this notion of serious organised crime, the 2010 Act introduced a number of substantive offences, including involvement in, direction of, and failure to report serious organised crime. In terms of sentencing, other offences may be aggravated by connection with serious organised crime. These legislative provisions will be described and analysed in turn, and their scope, necessity, effectiveness and use to date will be assessed. Taken as a whole, it will be suggested that the provisions are overly expansive, are of questionable necessity, and may not be effective in combatting organised crime.

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<sup>37</sup> See P Reuter, *Disorganized Crime: The Economics of the Visible Hand* (MIT Press, 1983).

<sup>38</sup> Levi, “The Organization of Serious Crimes for Gain” (n 12) 604.

<sup>39</sup> Scottish Government, *Letting Our Communities Flourish* (n 3) para 6.

<sup>40</sup> Criminal Justice and Licensing (Scotland) Bill, 3rd Marshellled List of Amendments for Stage 2, Amendment 345 per R Brown MSP.

<sup>41</sup> Scottish Parliament Justice Committee, Official Report, col 2883, (13 April 2010).



## C. INVOLVEMENT IN SERIOUS ORGANISED CRIME

Section 28 of the Criminal Justice and Licensing (Scotland) Act 2010 makes it an offence to agree with at least one other person to become involved in serious organised crime, and this is punishable on indictment by up to ten years in prison. Not only may a mere two people be involved, the agreement need not pertain to criminality: involvement includes agreeing to do something that may not itself be illegal, if the person knows, suspects, or ought reasonably to have known or suspected that so acting will enable or further the commission of serious organised crime.<sup>42</sup> Thus, the person need not intend to be or become involved in serious organised crime, and an objective standard may satisfy the *mens rea* of this inchoate offence.

Surely, the definition should require both intention to be involved in serious organised crime and also knowledge that the act will or is likely to further such criminality. Otherwise, its scope is so broad as to criminalise a huge swathe of otherwise unproblematic actions. For example, section 28 could encompass a mother who agrees to buy a mobile phone for her adult child who is involved in drug dealing, and who will use the phone to arrange meetings with fellow dealers, if it is determined that the mother ought to have known the phone would be so used. More contentiously still, it could apply to someone who drives two friends into town where the latter are planning to shoplift. Though these suggestions may seem ludicrous, they fall legitimately within the scope of this organised crime provision if knowledge or suspicion is imputed.

Besides concerns about the reach of the definition, it is questionable whether a discrete statutory offence is required at all, given the ability to prosecute under the common law offence of conspiracy. When this very point was raised prior to enactment,<sup>43</sup> the primary justification given for the new, separate provision was to improve the likelihood of securing of a conviction, on the basis that involvement in a specific offence needs to be proved for conspiracy.<sup>44</sup> Moreover, while the Lord Advocate accepted that “with creativity” conspiracy could be used to

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<sup>42</sup> S 28(2).

<sup>43</sup> See the submissions made to the Scottish Parliament Justice Committee, 18th Report, 2009 (Session 3) Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill, para 229-230.

<sup>44</sup> See the comments of the Director General of the Scottish Crime and Drug Enforcement Agency and the Lord Advocate: Scottish Parliament Justice Committee, Official Report, col 2062 (9 June 2009), (also referred to at Scottish Parliament Justice Committee, (n 43) para 232-233.

prosecute most of the alleged criminality aimed at by the new provisions, he stated that the involvement offence takes matters “a stage back” compared with the existing law: “In many cases, we have evidence that does not quite show that the person was at the actual conspiracy stage; rather, it relates to their becoming involved in a conspiracy.”<sup>45</sup> Thus, the Cabinet Secretary for Justice, Kenny MacAskill, stressed that the statute ensures that it is not as difficult to convict someone of involvement in serious organised crime, as it is to convict of conspiracy.<sup>46</sup>

The logic behind charging conspiracy in organised crime cases is that it permits the prosecution and conviction of those persons who play key leadership roles within organised crime groups or networks yet who avoid overt criminality to the greatest extent possible. Moreover, as a general rule, conspiracy charges can be used to prosecute criminals successfully when substantive offences are difficult to prove.<sup>47</sup> Thus, lower ranking actors in the criminal enterprise may also be charged with conspiracy. Though a conspiracy charge may relate to completed acts, it also permits the state to intervene before an offence is committed,<sup>48</sup> thereby facilitating effective intelligence-led policing, which involves interception at the stage of preparation (in contrast to reactive policing which in essence waits for a crime to occur).<sup>49</sup> This is critically important due to the complexity and sophistication of many organised crime offences.

The definition of conspiracy in Scotland derives from *HM Advocate v Wilson, Latta and Rooney*:

A criminal conspiracy arises when two or more persons agree to render one another assistance in doing an act, whether as an end or as a means to an end, which would be criminal if done by a single individual.<sup>50</sup>

So, for a conspiracy to be established, the agreement must involve the doing of something that would be criminal if committed by a lone individual. As Lord Cameron emphasised in *Maxwell v HM Advocate*:

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<sup>45</sup> Ibid 233.

<sup>46</sup> Ibid 234 per Cabinet Secretary, Kenny Macaskill.

<sup>47</sup> F Desroches “The use of organized crime and conspiracy laws in the investigation and prosecution of criminal organizations” (2013) 7 Policing 1.

<sup>48</sup> J Ayling, “Criminalizing organizations: towards deliberative lawmaking” (2011) 33 Law & Policy 149 at 163.

<sup>49</sup> Law Commission (n 29) para 2.5-2.9.

<sup>50</sup> *HM Advocate v Wilson, Latta and Rooney* unreported, 1968, Glasgow High Court per Lord Justice-Clerk Grant.

That crime is constituted by an agreement of two or more person to further or achieve a criminal purpose. A criminal purpose is one which if attempted or achieved by action on the part of an individual would itself constitute a crime by the law of Scotland. It is the criminality of the purpose and not the result which may or may not follow from the execution of the purpose which makes the crime a criminal conspiracy.<sup>51</sup>

In this respect section 28 certainly is easier to satisfy insofar as the agreement there may pertain to something legal that facilitates or enable serious organised crime. Nonetheless, the statutory provision is akin to the common law offence, in terms of its focus on the purpose and not the result, and so in this respect the charges are comparable.

While Sir Gerald Gordon observed in 1967 that charges of conspiracy were uncommon in Scotland,<sup>52</sup> the situation has changed somewhat since then. It has been called “a fairly regular practice”,<sup>53</sup> though from 2006 to 2012 the number of offences proceeded against for conspiracy under common law ranged from just 6 to 16 in any given year.<sup>54</sup> Nonetheless, this is far less frequent than in England and Wales where the freestanding offence of conspiracy, such as conspiracy to import controlled drugs, is regarded as playing an important part in the “armoury” of prosecutors.<sup>55</sup>

In *HM Advocate v Al Megrahi* Lord Sutherland quoted with approval from *Director of Public Prosecutions v Doot*:

When there is agreement between two or more to commit an unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to its intending to carry out the design.<sup>56</sup>

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<sup>51</sup> *Maxwell v HM Advocate* 1980 JC 40 at 43.

<sup>52</sup> G Gordon *Criminal Law of Scotland* (1967) 184.

<sup>53</sup> See *HM Advocate v Al Megrahi* 2000 SCCR 177 para 29 per Lord Sutherland.

<sup>54</sup> The figures were 8, 8, 10, 16, 10, and 6 respectively. Source: Scottish Government Court Proceedings Database, FoI/13/00657.

<sup>55</sup> The Law Commission (n 29) para 2.34. See D Ormerod “Conspiracy: conspiracy to launder money” (2006) Crim L R 999 at 1003 for an analysis of some of the Lords’ criticisms in *R v Saik* (2006) UKHL 18 of the use of conspiracy in this way.

<sup>56</sup> *HM Advocate v Al Megrahi* 2000 SCCR 177 para 7 referring to *Director of Public Prosecutions v Doot* (1973) AC 807 per Viscount Dilhorne.

And as Lord Sutherland emphasised further, conspiracy is a continuing crime until abandoned.<sup>57</sup> In other words, conspiracy may be charged even if the substantive offences are completed. Thus, there is nothing in a jurisprudential sense that precludes the charging of conspiracy more broadly in Scotland. Indeed, in *La Torre v HM Advocate*, an extradition case, the Lord Justice Clerk accepted the contention of the Lord Advocate that the conduct relating to membership of the *Camorra*-type organisation, whose purpose is to conspire to commit certain specified crimes, could readily be labelled as a criminal conspiracy and so satisfied the double criminality rule.<sup>58</sup>

Conspiracy indictments are often long and complicated, in that they charge the conspirator with conspiracy to do X, and of doing Y and Z in pursuance of that conspiracy.<sup>59</sup> While this practice has been described as “somewhat regrettable”, as something that may cause confusion to juries,<sup>60</sup> and as “arguably prejudicial”,<sup>61</sup> it is not incompetent.<sup>62</sup> It is unclear whether the new statutory offence will remedy this matter of complexity, as it is likely that a person would be charged with involvement and with agreeing to do something to enable serious organised crime. However, an individual may be acquitted of conspiracy yet be convicted of any subheads which are themselves crimes.<sup>63</sup> This presumably would be mirrored in practice regarding the section 28 offence of involvement, though this is yet to be evidenced. There is no available report on the one prosecution for this offence, which occurred in 2011.<sup>64</sup> Overall, the presentation of the case is likely to be lengthy and multifaceted. This is unlikely to be remedied in the cases relating to section 28, given the necessity of establishing the nature of the relationship and the purpose of the agreement.

The acquittal of or failure to convict a co-conspirator does not preclude conviction of the other person,<sup>65</sup> and this extends to other situations where the parties are acting in concert.<sup>66</sup> The conviction of a lone individual is particularly pertinent in the context of organised crime

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<sup>57</sup> *HM Advocate v Al Megrahi* para 13.

<sup>58</sup> *La Torre v HM Advocate* [2006] HCJAC 56 paras 123- 1247890-.

<sup>59</sup> C H W Gane, C N Stoddart and J Chalmers *A Casebook on Scottish Criminal Law* 4<sup>th</sup> edn (2009) para 6-04.

<sup>60</sup> *HM Advocate v Al Megrahi* para 29.

<sup>61</sup> Gordon (n 52) para 6.59.

<sup>62</sup> *HM Advocate v Al Megrahi* para 29.

<sup>63</sup> Gane et al (n 59) para 6-10.

<sup>64</sup> Scottish Government Court Proceedings Database, FoI/13/00657.

<sup>65</sup> *Howitt v HM Advocate* 2000 JC 284; *Duffy v HM Advocate* 2000 JC 284.

<sup>66</sup> This is evident from *Howitt v HM Advocate* where Howitt had been charged with fraud, averred to have been carried out by him “while acting along with another”. Each appellant had appeared alone before the trial court; a verdict of not proven was found against Howitt’s partner, but Howitt was later convicted.

investigations, where undercover police officers or “covert human intelligence sources” (CHIS) are likely to be used,<sup>67</sup> and so the agreement may be with one person who never truly agreed or intended to commit the act or carry out the design. It is unclear in Scots common law whether an agreement, in the sense that is needed for conspiracy, can be said to exist if one of the parties is an undercover officer.<sup>68</sup> Thus, the equivalent question in relation to the statutory provision is whether a person may be convicted of involvement in serious organised crime for agreeing to do something with a CHIS. Section 28 makes no reference to such matters. Here it is suggested that section 28 could be satisfied by an “agreement” with a CHIS where the latter agreed to do something which is not illegal, as true agreement could be proven, but this remains to be seen in jurisprudence. It is regrettable that the legislation did not make provision for this, to remedy an existing lacuna.

A key danger in relation to covert human intelligence sources is the encouragement of criminality<sup>69</sup> and the resultant possibility of entrapment which would be likely to breach Art 6.<sup>70</sup> Of course, there is no substantive defence of entrapment in Scotland; a prosecution based on entrapment is an abuse of process and should not proceed.<sup>71</sup> Such a plea was refused in *Jones and Brown v HM Advocate*, a case concerning conspiracy to extort money based on the return of a da Vinci painting, stolen from the Duke of Buccleuch.<sup>72</sup> Here, the police were deemed not to have “crossed the boundary between causing an offence to be committed and providing an opportunity for the appellants to commit an offence”.<sup>73</sup> Operationally, this may prove a difficult line to tread in terms of the involvement offence, and it remains to be seen whether this hinders the use of the section in court.

Though section 28 replicates conspiracy to an extent, it also extends criminal liability in some respects. Understandably, prosecutors and police practitioners welcome such extension to encompass those on the peripheries of organised crime, to ensure there is no evasion of

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<sup>67</sup> Regulation of Investigatory Powers (Scotland) Act 2000 s 1.

<sup>68</sup> P Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2009) para 8.7.2.

<sup>69</sup> See J Ross, “The place of covert policing in democratic societies: a comparative study of the United States and Germany” (2007) 55 *American J of Comp Law* 493.

<sup>70</sup> See *Teixeira de Castro v Portugal* (1998) 28 EHRR 101; *R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060 para 15. In the former case the European Court of Human Rights held that the necessary inference from the circumstances was that these officers had “exercised an influence such as to incite the commission of the offence”.

<sup>71</sup> *Brown v HM Advocate* 2002 SLT 809.

<sup>72</sup> *Jones and Brown v HM Advocate* [2009] HCJAC 86; see F Leverick and F Stark, “How do you solve a problem like entrapment? *Jones and Doyle v HM Advocate*” (2010) 14 *Edin LR* 467.

<sup>73</sup> *Jones and Brown v HM Advocate* para 48.

responsibility. On the other hand, section 28 raises concerns about the scope of culpability through its application to legal acts. The wide definition catches a range of behaviours that will never be prosecuted and which indeed may not be culpable, and in doing so undermines the legitimacy of the criminal law. Moreover, the involvement offence does not remedy the concerns of Levi and Smith who criticised conspiracy law and practice for its inability to contemplate the activities of a multi-faceted criminal enterprise, and for its focus on a particular agreement and thus its difficulty in identifying sub-conspiracies.<sup>74</sup> This is due to the fact that section 28 remains focused on the individual, and on a certain agreement. Thus, in addition to the concerns raised about its breadth, it is questionable whether this provision will be effective in addressing serious organised crime.

#### **D. DIRECTING SERIOUS ORGANISED CRIME**

Directing serious organised crime is another separate substantive offence introduced by the 2010 Act, punishable by up to fourteen years' imprisonment.<sup>75</sup> This involves directing or inciting a person to commit a serious offence or an offence connected to serious organised crime, or directing one person to direct another to so act, regardless of whether the person acts in this manner. The rationale<sup>76</sup> for this provision is to make more likely the prosecution and conviction of those people who are part of the upper echelons of organised crime at the "high level end of an organised crime network"<sup>77</sup> and who may therefore be removed from action on the ground. The latter dimension of the offence, directing someone to direct another to so act, takes account of the often complex hierarchies and structures of organised crime groups, and the layers of communication involved. Though this offence also involves directing someone to commit a serious offence regardless of the nature of their relationship and the structure of the interaction, the intention of the directing person must retain the connection to organised crime.

The directing person must do something to direct another person to commit the offence; he must intend that the thing done will persuade that other person to commit the offence, and he

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<sup>74</sup> M Levi and A Smith, A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales, *Home Office Online Report 17/02* (2002) at 16.

<sup>75</sup> S 30.

<sup>76</sup> See Criminal Justice And Licensing (Scotland) Bill Policy Memorandum, para 110; also Justice Committee, col 1982 (2 June 2009).

<sup>77</sup> Criminal Justice And Licensing (Scotland) Bill Policy Memorandum, para 116.

must intend that the thing done will result in a person committing serious organised crime, or will enable a person to commit serious organised crime.<sup>78</sup> It is notable that his intention need not be towards the directed person being persuaded to commit the offence, but towards “a person” committing the offence. This takes account of the chains of command and layers of structure in such groups. Section 30 seeks to ensure criminal liability for actors who do not perpetrate crimes physically themselves, but who play a critical role in terms of generating a common purpose, in ordering the commission of certain offences, and in managing the criminal network. There is no requirement to prove control, nor to establish that the person’s role is indispensable or that his withdrawal would affect the plans of the group.<sup>79</sup>

One could argue that section 30 replicates the law on incitement. There is limited authority on this common law inchoate offence in Scotland: as Lord Rodger noted in *Baxter v HM Advocate*, “incitement to commit a crime is rarely encountered in the Scottish courts except where the incitement has taken effect and the crime has been committed.”<sup>80</sup> Nevertheless, it is clear that, in inciting someone to act, explicit instruction is not necessary,<sup>81</sup> and the offence need not be completed. So, there is a significant degree of overlap with the new statutory offence. In addition, while section 30 includes the term “direction”, this is no broader than the language of “reached and sought to influence the mind of the other person towards the commission of a crime” which the Baxter court used.<sup>82</sup>

Though one could argue that section 30 has clearer parameters and therefore improves on the common law concept of incitement, it is in essence a duplication of existing law, though specifically in relation to serious organised crime. Even accepting this, its enactment may be understandable in a symbolic sense. The name of the offence is important for accurate labelling,<sup>83</sup> and to convey moral opprobrium through its acknowledgment of the gravity of the behaviour.

In addition to such issues about the necessity of the direction offence, its effectiveness is also questionable. Though it is hoped that section 30 would target higher ranking individuals, it

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<sup>78</sup> S 30 (3).

<sup>79</sup> See J D Ohlin, “Joint Intentions” in F Tanguay-Renaud and J Stribopoulos (eds) *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (2012) 267 at 270.

<sup>80</sup> *Baxter v HM Advocate* 1998 JC 219, 221.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> See J Chalmers and F Leverick, “Fair Labelling in Criminal Law” (2008) 72 *Modern L Rev* 217.

can be committed only in relation to a specific offence which a person is directed or incited to commit, so there must be a direct link to criminal action. Therefore it is unclear how this offence would enable the conviction of someone who maintains a distance from such actions. Indeed, the provision has been used just once in a prosecution,<sup>84</sup> so it remains to be seen whether, and if so how, effective it will be in addressing organised crime.

## **E. EVIDENCE MATTERS**

This section considers the applicability of evidential rules to these two new offences. The most fundamental aspect of complex organised crime trials concerns the nature and admissibility of evidence. Even if criminality is detected and particular suspects are identified, testimony against organised criminals is very difficult to obtain, and witness intimidation is a live issue; thus communications surveillance and covert sources become central to successful prosecutions.<sup>85</sup> This issue becomes even more pronounced when those in the upper layer of an organisation refrain from direct perpetration of criminal actions. In an attempt to remedy this, some jurisdictions' legislation on criminal organisations makes some key changes to evidence and trial format. For example, in the Republic of Ireland, opinion evidence of any police officer (or former officer) is admissible in relation to the existence of a particular criminal organisation.<sup>86</sup> In addition, trials for offences relating to criminal organisations in Ireland are held in the juryless Special Criminal Court, on the basis that the ordinary courts are deemed to be inadequate to secure the effective administration of justice and the preservation of public peace and order.<sup>87</sup>

Despite the particular issues that may arise in relation to proving the perpetration of serious organised crime, there has been no alteration of the rules of evidence or criminal procedure in relation to the direction or involvement offences under the Criminal Justice and Licensing (Scotland) Act 2010. The Act does not prescribe any particular form of trial, and so the usual mode of jury trial takes place.<sup>88</sup> Nor does the Act alter evidential rules in any way. Thus, the conventional rules apply relating to the admissibility of evidence,<sup>89</sup> burdens of proof,<sup>90</sup>

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<sup>84</sup> Source: Scottish Government Court Proceedings Database, FoI/13/00657.

<sup>85</sup> See L Campbell, *Organised Crime and the Law* (2013) ch 5.

<sup>86</sup> Criminal Justice Act 2006 s 71B.

<sup>87</sup> Criminal Justice (Amendment) Act 2009 s 8(1).

<sup>88</sup> See P Duff, "The Modern Scottish Jury in Criminal Trials" (2009) 13 Edin LR 320.

<sup>89</sup> See M Ross and J Chalmers, *Walker and Walker: the Law of Evidence in Scotland* 3rd edn (2009) ch 1.1.



and corroboration,<sup>91</sup> and so on. This retention of standard procedures is to be welcomed in maintaining sufficient safeguards and protections for the accused person.

Despite this, the rules of evidence in Scotland regarding co-accused persons that have a common criminal purpose already are a little more permissive than in cases of individual criminality, in that anything said or done by one of the co-accused in furtherance of that purpose is evidence against the other.<sup>92</sup> This common enterprise exception permits the use of hearsay evidence against another accused when these words are uttered or documents issued in furtherance of the common design. As the High Court stated in *Hamill v HM Advocate*,

where there is a conspiracy or concert each accused is held responsible for what is done in pursuance of that conspiracy or concert, whether it takes the form of actings or of actings in association with statements.<sup>93</sup>

Renton and Brown highlight a straightforward example of this exception in a case of fraud where false statements are made by one of the conspirators without the other being present, but where the statements are in pursuit of their common purpose.<sup>94</sup> Hearsay evidence of such statements is admissible against the party who did not utter the statements and who was not present.

In *Hamill*, Hamill and his fellow conspirator Gemmill were alleged to be acting together in pursuance of a common criminal purpose, namely an enterprise for the supplying of heroin. Gemmill made a number of statements about Hamill's involvement, including a directly incriminatory statement mentioning Hamill's name in relation to the supply of drugs. The rule permitting the admissibility of such evidence was held to apply, as there was a common purpose to supply drugs.<sup>95</sup> Nonetheless, the court noted that there was no authority to justify extending the principle beyond cases of common criminal purpose. So, *Hamill* suggests that indictments for the statutory serious organised crime offences that involve a common purpose will facilitate the

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<sup>90</sup> Ibid, ch 2.11.

<sup>91</sup> Of course it remains to be seen whether the Criminal Justice (Scotland) Bill abolishes this requirement. See also Lord Carloway, *Review of Criminal Law and Practice* (2011); D Nicolson and J Blackie "Corroboration in Scots Law: 'archaic rule' or 'invaluable safeguard'?" (2013) Edinburgh LR 152.

<sup>92</sup> *Dickson on the Law of Evidence in Scotland* 3<sup>rd</sup> edn (1887) para 363. This is also true in England and Wales: Criminal Justice Act 2003 s 118. See K Spencer "The common enterprise exception to the hearsay rule" (2007) 11 Int J of Evidence and Proof 106.

<sup>93</sup> *Hamill v HM Advocate* 1999 SCCR 384.

<sup>94</sup> See Renton and Brown *Criminal Procedure* 6<sup>th</sup> edn (2013) para 26.24.

<sup>95</sup> Ibid.

admissibility of evidence that would otherwise be regarded as hearsay. Of course, despite the pragmatic desire on the part of the State to include such evidence given its value in cases relating to organised crime, the usual concerns about hearsay and its credibility apply in this instance. Nonetheless, *Johnston v HM Advocate* imposes some parameters by indicating that this exception to the hearsay rule does not apply to statements made after the common purpose has been achieved or has failed.<sup>96</sup>

## **F. FAILURE TO REPORT SERIOUS ORGANISED CRIME**

In addition to the new crimes of involvement and direction, failure to report serious organised crime has now been criminalised. Section 31 of the Criminal Justice and Licensing (Scotland) Act 2010 makes it an offence to fail to report to a police constable one's knowledge or suspicion that another person is involved in or directs serious organised crime. This is a crime of omission, and so runs counter to the standard imposition of liability in Scots criminal law, which provides that, in general, one cannot commit a crime by failing to act or to prevent harm.<sup>97</sup> Such knowledge or suspicion must derive from information obtained in the course of the person's profession or employment, or as a result of the close personal relationship between the parties if one person has materially benefited from the other's commission of serious organised crime. Subsection (5) provides that disclosure is not required by a person who is a professional legal adviser of information obtained in privileged circumstances, or of knowledge or a suspicion based on information obtained in such circumstances. It is not difficult to envisage other situations where such knowledge or suspicions may arise, such as in relation to the rental of properties, the provision of accounting advice, and so on. This provision targets, in part, those professionals that may facilitate in some ways the commission of serious organised crime, or who may "turn a blind eye", so to speak.

The requirement of material benefit in relation to the close personal relationship dimension is to mitigate the potential harshness of this provision on family members or partners of persons suspected of involvement in serious organised crime who may become aware of

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<sup>96</sup> *Johnston v HM Advocate* 2012 JC 49 para 42.

<sup>97</sup> *HM Advocate v Kerr* (1871) 2 Coup. 334. See AP Simester, "Why Omissions Are Special" (1995) 1 Legal Theory 311 and P Smith, "Omissions and Responsibility in Legal Theory" (2003) 9 Legal Theory 221.

matters inadvertently. Before enactment, Sir Gerald Gordon suggested that the definition would be improved by limiting “material benefit” to a direct share in the proceeds of crime.<sup>98</sup> This would have excluded from the scope of the offence family members and partners who may benefit indirectly from serious organised crime but who are not complicit in the criminality and who do not directly avail of the profits. In response, the Cabinet Secretary argued that flexibility is crucial to deal adequately with such criminality and that rather than narrowing the definition reliance would be placed on the discretion of the police and the prosecution authorities “to report and prosecute such offending appropriately”.<sup>99</sup> This exemplifies the broad approach taken in these provisions, which ultimately is predicated on a benign view of State power and predicted limited use of this section.

Section 31 encroaches in a disproportionate way on private and family life as protected by Article 8 of the European Convention on Human Rights, by placing an onus on partners, spouses and children to report suspicions regarding family members or carers. Crucially, section 86 of the 2010 Act makes the spouse or civil partner of the accused a compellable witness in any proceedings.<sup>100</sup> This means they will be treated the same as any other witness. So, in relation to section 31, a spouse may be called as a witness and cross-examined as to the behaviour of the other spouse and the grounds of his/her suspicion or knowledge, and the court may hear evidence from other persons regarding such communications, as obtained by covert surveillance, for example. In addition, section 31 makes no reference to children, and so it appears the teenage child of a suspected criminal falls within the scope of this provision and could be prosecuted. That being said, subsection (4) provides that is a defence for a person charged with an offence under section 31 to prove that he or she had a reasonable excuse for not making the disclosure. Surely the age of the individual, the nature of the relationship, and any potential imbalance of power would be taken into account at this juncture.

It is questionable whether this offence will be effective in addressing organised crime in Scotland. There have yet to be any prosecutions, though of course, the deterrent effect of the law cannot be discerned and may well influence professionals to come forward with information when previously they would not have done so. Moreover, to be fair, the prospect of overzealous use by prosecutors is not likely, not least due to resource constraints. Nonetheless, it would be

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<sup>98</sup> See Scottish Parliament Justice Committee (n 43) para 263 *per* Sir Gerald Gordon.

<sup>99</sup> Scottish Parliament Justice Committee 2010 (n 41) col 2883.

<sup>100</sup> Amending the Criminal Procedure Scotland Act 1995, s 264.

preferable to have more tightly defined law than to rely on agents of the State to use these powers in a responsible and restrained manner. There may be a civic responsibility and moral duty “to assist the law in achieving its proper purposes”<sup>101</sup> and, of course, it would be preferable for people to report all suspicions and knowledge regarding serious organised crime to the police. Having said that, the imposition of a criminal sanction for not so assisting is questionable in terms of individual autonomy, and in terms of fairness to individuals who may be intimidated and connected to the offending party.<sup>102</sup> Moreover, the breadth of this novel offence may undermine the perceived legitimacy of the law.

## **G. OFFENCES AGGRAVATED BY CONNECTION WITH SERIOUS ORGANISED CRIME**

In addition to these three substantive provisions of involvement, direction and failure to report, section 29 provides that an offence may be aggravated by a connection with serious organised crime if the offender was motivated wholly or partially by the aim of committing or conspiring to commit serious organised crime, whether or not he in fact enabled himself or another person to commit such a crime. Where this aggravation is libelled and proved it must be taken into account by the court in determining the appropriate sentence, and the court must state on conviction that the offence was so aggravated and the difference in sentence had there been no such connection.

This provision has been used on a number of occasions, in relation to offences under the Misuse of Drugs Act 1971,<sup>103</sup> money laundering offences<sup>104</sup> and international economic migration fraud.<sup>105</sup> The desire for robust sentences is exemplified by Lord Uist’s statement that “Organised crime in this country must be suppressed by the imposition of severe sentences on

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<sup>101</sup> R A Duff, *Trials and Punishments* (1986) 132.

<sup>102</sup> See Scottish Parliament Justice Committee (n 43) para 275.

<sup>103</sup> See, for example, *HM Advocate v McIntyre, McKinnon, Hughe and Gardner*, sentencing statement, Livingston High Court, January 2013 per Lord Boyd; *HM Advocate v Beu*, sentencing statement, Edinburgh High Court, May 2012 per Lord Uist; accessed at <http://www.scotland-judiciary.org.uk/8/0/Sentencing-Statements>.

<sup>104</sup> *HM Advocate v Beu*.

<sup>105</sup> See Crown Office and Procurator Fiscal Service, Press Release, “Men sentenced to almost 10 years imprisonment after international fraud uncovered” 20 March 2013.

those who are convicted of crimes connected with it”.<sup>106</sup> Organised criminals are viewed as rational and motivated by profit, and so as likely to be responsive to deterrent sentences. Moreover, robust sentences involve both instrumental and expressive aspects. Such sentences are incapacitative and retributive and thereby are directed at the individual and future offenders, but also communicate moral censure on behalf of and to the wider community. The articulation in court as to the cause for aggravation underlines the expressive dimension of this legislative provision.

Nonetheless, section 29 is superfluous and unnecessary, given that group criminality and other factors relating to serious offences like conspiracy to commit drug trafficking offences, for example, are likely to aggravate the sentence anyway. Moreover, it is dubious whether this section will indeed have a deterrent effect: empirical evidence suggests the likelihood and speed of imposition of sentence is of more influence than its length in terms of deterrence.<sup>107</sup>

## H. CONCLUSION

The Criminal Justice and Licensing (Scotland) Act 2010 seeks to enhance the ability of the State to “disrupt” and “deter”<sup>108</sup> serious organised criminality, through the introduction of various new measures. While concerns may be raised as to the extent and necessity of the provisions, it cannot be disputed that they do criminalise some problematic behaviour that may well otherwise have fallen beyond the scope of the common law. The reception to the 2010 Act from police and prosecution practitioners has been positive, and the most recent strategic plan of the Crown Office and Procurator Fiscal Service speaks of “us[ing] the statutory charges designed to tackle serious organised crime wherever possible”.<sup>109</sup> Part 2 of the 2010 Act is a very significant development in this area of law and criminal justice.

Having said this, it remains unclear whether Part 2 will be effective in tackling organised crime. It is difficult to ascertain the success of any legal measures just four years after enactment, and, as Levi and Smith emphasise, there is an inevitable time lag before prosecution in complex

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<sup>106</sup> *HM Advocate v Beu* per Lord Uist.

<sup>107</sup> M Tonry “Learning from the Limitations of Deterrence Research” (2008) 37 *Crime & Justice* 279 at 281; G Hales, C Lewis and D Silverstone, *Gun crime: The Market In and Use of Illegal Firearms* (2006) at 95.

<sup>108</sup> See Scottish Government, *Letting Our Communities Flourish* (n 3) at 4.

<sup>109</sup> Crown Office and Procurator Fiscal Service, *COPFS Strategic Plan: Our Priorities for 2012-2015* (2013) 5.

cases particularly.<sup>110</sup> Of course, success is determined by how we define it, and prosecution and conviction rates are not the only yardsticks. The symbolic function of these offence labels is crucial,<sup>111</sup> and this may be a welcome development in itself. As Kenny MacAskill noted, this legislation sends the message that society takes organised crime extremely seriously.<sup>112</sup> This point is made to the community at large, with the State denouncing organised crime in a cathartic criminalisation: the fact that something is being done is seen as gratifying.<sup>113</sup> The Act is also a statement to prospective and current offenders and those facilitators on the periphery: it is hoped, by the specific criminalisation in addition to aggravation at sentence, to underline the gravity of serious organised crime and thereby deter them from involvement. Overall, it is likely that these provisions will have at least some degree of impact on organised crime groups in Scotland, if only in forcing alterations to the way they operate and organise their activities.

\*\* This paper is a draft; a final version will appear in volume 18(2) of the Edinburgh Law Review\*\*

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<sup>110</sup> Levi and Smith (n 74) 6.

<sup>111</sup> See Chalmers and Leverick (n 83) at 246.

<sup>112</sup> Scottish Parliament Justice Committee, *Official Report*, cols 2195-6 (23 June 2009)(also referred to at Scottish Parliament Justice Committee (n 43) para 234).

<sup>113</sup> D Garland, *The Culture of Control* (2001) 133.